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SEAPORT WORLDWIDE SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
SURAYA OTHMAN JCA
LEE HENG CHEONG JCA
B NORDIN HASSAN JCA
[CIVIL APPEAL NOS: J-01(IM)-323-07-2020 & J-01(A)-352-08-2020]
27 JANUARY 2022

C **Abstract** – *It is not justified for the applicant to file an application for judicial review when there is in existence the specific remedy of appeal, as in this case, an appeal to the Special Commissioners of Income Tax against the decision of the Director General of Inland Revenue, more so, when there are no exceptional circumstances to allow such application.*
D *Hence, the challenge against the additional notices of assessment ought to fail as the DGIR had rightly exercised his statutory powers under the Income Tax Act 1967.*

E ***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Application against decision of Director General of Inland Revenue in imposing additional assessment – Grant of prohibition order by High Court while appeal to Special Commissioners of Income Tax still pending – Whether applicant exhausted domestic appeal process under s. 99(1) of Income Tax Act 1967 – Whether special circumstances existed to allow by-passing of alternative remedy – Whether additional assessment made pursuant to statutory powers – Whether excess or*
F *absence of jurisdiction in assessment of tax proven – Whether High Court erred in granting prohibition order*

G ***REVENUE LAW:*** *Income tax – Additional assessment – Income under lease agreement – Whether revenue income – Whether lease agreement indicated disposal of leasehold interest in land – Whether transaction mere lease of land – Whether fell within definition of 'project development' under reg. 3 of Income Tax (Property Development) Regulations 2007 – Whether imposition of penalty in accordance with law – Income Tax Act 1967, ss. s. 4(a), (d), 33(1), 113(2)(a) & (b)*

H Seaport Worldwide Sdn Bhd ('SWSB'), was the registered proprietor of five plots of leasehold land which were alienated by Johor State Government for a term of 99 years with a consideration of RM50,493,936. SWSB entered into a lease agreement wherein 50 hectares out of a total 315.19 hectares from one of the plots was leased out to ATT Tanjung Bin Sdn Bhd ('ATB') for a period of 30 years with an option to renew for an additional 30 years.
I The total consideration of the lease was RM107,600,000, payable in stages according to five milestones agreed under the agreement. On 17 May 2017, the Director General of Inland Revenue ('Revenue') conducted an

investigation on SWSB and the initial finding was that the proceeds received by SWSB arising from the lease agreement with ATB was rental income and taxable under s. 4(d) of the Income Tax Act 1967 ('ITA'). However, by the Revenue's letter dated 28 May 2019, SWSB was informed that the income received under the lease agreement was revenue income or gains taxable under s. 4(a) of the ITA. Hence *vide* notices of assessment dated 31 October 2019, additional assessments in Form J, for Years of Assessment ('YA') 2012 and 2013 were raised on SWSB and by letter dated 6 November 2019 to SWSB, the Revenue stated the tax computation and the imposition of 60% penalty under s. 113(2) of the ITA. SWSB filed an appeal to the Special Commissioners of Income Tax ('SCIT') against the notices of assessment for the YAs 2012 and 2013 *vide* Form Q. The Revenue issued Notification of Non-Chargeability for the YAs 2007, 2008, 2009, 2010, 2011, 2014 and 2015 to SWSB. However, before its appeal to SCIT was heard, SWSB filed a judicial review application at the High Court. The High Court (i) granted the Order of Prohibition ('PO') to prohibit the Revenue, *inter alia*, from taking any steps, enforcement action or proceedings relating to notices of assessment for YA 2012 and 2013; and (ii) dismissed other reliefs sought by SWSB in the judicial review application. Hence, the two appeals herein by the Revenue and SWSB, respectively against the High Court decision. The core issues for the court's determination in these appeals were: (i) whether SWSB was entitled for remedies sought by way of judicial review before the domestic appeal process under s. 99 of the ITA was exhausted; (ii) whether the Judicial Commissioner's ('JC') decision in granting the PO to prohibit the Revenue from taking any steps, enforcement action or proceedings relating to notices of assessment for YAs 2012 and 2013 was correct in law; (iii) whether the transaction under the lease agreement between SWSB and ATB was a sale of the leasehold interest of the land or a mere lease and whether the development expenses claimed by SWSB were deductible under sub-s. 33(1) of the ITA; and (iv) whether the penalty under s. 113(2) of ITA which had been imposed by the Revenue at the rate of 60% against SWSB was in accordance with law.

Held (allowing appeal by Revenue and dismissing SWSB's appeal with costs)

Per Nordin Hassan JCA delivering the judgment of the court:

(1) Where an alternative remedy exists, the remedy by way of judicial review could only be exercised in very exceptional circumstances. *Certiorari* should not normally be issued except if it can be shown the existence of clear lack of jurisdiction, failure to perform statutory duty or serious breach of principles of natural justice. (paras 16 & 17)

(2) SWSB had filed an appeal to the SCIT against Form J for YAs 2012 and 2013 *vide* Form Q dated 14 November 2019 and thereafter filed the judicial review application. It was an abuse of court process to maintain the judicial review application. There were no special or exceptional

circumstances which entitled SWSB to by-pass the alternative remedy of domestic appeal process under s. 99(1) of the ITA. The additional assessment for YAs 2012 and 2013 on SWSB was made by the Revenue pursuant to its statutory powers under sub-ss. 91(1), 91(3) and 96 of the ITA. By its failure to establish the existence of lack or absence of jurisdiction on the part of the Revenue, blatant failure to perform statutory duty or breach of the principle of natural justice by the Revenue, SWSB's contention that the Revenue had acted *ultra vires* its statutory powers and acted in clear violation of the provision of the ITA, was bereft of any basis. On this ground alone, the JC's decision in the judicial review application ought to be set aside and the matter was to be referred to SCIT for its determination. (paras 22 & 27-30)

(3) A PO may be granted in circumstances where there is an excess or absence of jurisdiction or there is a breach of the rules of natural justice. The ITA provides power for the Revenue to make the assessment under ss. 91(1), 91(3) and 96 of the Act. Further, ss. 103(1), 103B and 106(1) authorise the Revenue to initiate civil recovery proceedings for taxes due and payable against SWSB based on the investigation carried out by the Revenue. In fact, s. 103B of ITA requires a taxpayer to pay taxes due, even if there is any proceeding instituted by the taxpayer. There was no excess or absence of jurisdiction on the part of the Revenue in its assessment of tax on SWSB. Further, there was nothing to show that the Revenue had departed from the rules of natural justice in exercising its statutory duty when conducting the assessment. Equally important, there was no substantial injustice that had ensued or was likely to ensue against SWSB. SWSB had the opportunity to establish their case before the SCIT and thereafter, if aggrieved with the decision of the SCIT, the matter could be referred to court. The JC fell into error in granting the PO against the Revenue. (paras 36, 37, 39 & 41)

(4) The lease agreement between SWSB and ATB and, in particular, cl. 2.1 and Recital C, clearly showed that the 50 hectares of land was leased out by SWSB to ATB for a term of 30 years, with an option to renew for another 30 years. There was no provision in the lease agreement that showed or indicated the sale or disposal of leasehold interest in the said land by SWSB to ATB. Conversely, under cl. 2.2C of the agreement, it required SWSB to sub-divide the land and acquire a separate title for the land leased to ATB. After the sub-division, SWSB was to register ATB as lessee. Hence, the transaction arising from the agreement was clearly a mere lease of the land. Any restriction under the National Land Code for SWSB to carry out the transaction as a sale or disposal of the leasehold interest in the land did not change the fact that SWSB and ATB had entered into a legally valid and binding lease agreement. The consideration for SWSB to lease the said land was the rental payment which was the subject matter for the Revenue in making the assessment of tax. (paras 45-48)

(5) In interpreting tax legislation, the rule of strict construction applies and there is no room of intendment. Further, a court should not read words into an Act of Parliament unless there is clear reason for it found within the Act itself. The lease of the land to ATB did not fall within the definition of 'project development' under reg. 3 of the Income Tax (Property Development) Regulations 2007 and the JC had read words in the definition of 'project development' in opining that the words 'sale of vacant lots' to include 'sale of leasehold interest in the vacant lots'. This was clearly an error in interpreting a statute and in particular, tax legislation. In the circumstances, the Revenue was correct in its decision that the development expenses, allegedly incurred by SWSB, was not deductible under s. 33(1) of the ITA. The SCIT had yet to hear the appeal by SWSB and hence, had not made any finding of facts in this case. As such, the issue of the appellate court being bound by the finding of facts by SCIT did not arise. (paras 55-57 & 59)

(6) Revenue, upon investigation, discovered that SWSB had failed to declare the full rental payment received from ATB arising from the lease agreement in its tax return form, an act as described in sub-s. 113(2)(a) and (b). As such, the Revenue had the discretion to impose a penalty equal to the amount of tax which had been undercharged. However, in this case, the Revenue had only imposed a penalty at the rate of 60% on SWSB. The imposition of penalty by the Revenue was in accordance with the law and facts. (paras 62 & 66)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2021] MSTC 30-454 ***(refd)***

Gan Boon Aun v. PP [2016] 6 CLJ 647 FC ***(refd)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Inchcape Malaysia Holdings Bhd v. RB Gray & Anor [1985] 2 MLJ 297 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri (LHDN) v. IBM Malaysia Sdn Bhd [2021] 1 CLJ 776 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Peter Chong Ngen Onn & Ors v. Colonel Adam Abu Bakar & Ors [1976] 1 LNS 93 FC ***(refd)***

R v. Bloomsbury Income Tax Commissioners, ex p Hooper [1915] 7 TC 59 ***(refd)***

R v. Clerkenwell Commissioners, ex p Kodak Ltd [1901] 2 KB 879 ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***

Strawberry Park Resort Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (SCIT Appeal No. PKR 540) (Unreported) ***(dist)***
Sun Man Tobacco Co Ltd v. Government Of Malaysia [1973] 1 LNS 144 FC ***(refd)***
Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 10 CLJ 114 CA ***(refd)***
Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 6 CLJ 1032 HC ***(refd)***
UN Finance Bhd v. Director-General Of Inland Revenue [1975] 1 LNS 186 FC ***(refd)***
Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 4(a), (d), 33(1), 96, 99(1), (3), 103(1), 103B, 106(1), 113(1), (2)(a), (b)
Income Tax (Property Development) Regulations 2007, reg. 3
Inland Revenue Board of Malaysia Act 1995, s. 10(a)

(Civil Appeal No: J-01(IM)-323-07-2020)
For the appellant - Anand Raj & Abhilaash Subramaniam; M/s Shearn Delamore & Co
For the respondent - Nor Mareza Mat Rejab & Syazana Safiah Rozman; FCs

(Civil Appeal No: J-01(A)-352-08-2020)
For the appellant - Nor Mareza Mat Rejab & Syazana Safiah Rozman; FCs
For the respondent - Anand Raj & Abhilaash Subramaniam; M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see Seaport Worldwide Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2020] 1 LNS 1442 (overruled in part).]

Reported by S Barathi

JUDGMENT

Nordin Hassan JCA:

[1] There are two appeals before this court arising from the decision of the High Court dated 25 September 2020 in a judicial review application filed by Seaport Worldwide Sdn Bhd ("SWSB") against the Director General of Inland Revenue ("the Revenue"). The appeals are as follows:

(i) The Revenue's appeal against the decision of the High Court in granting the order of prohibition to prohibit the Revenue *inter alia* from taking any steps, enforcement action or proceedings relating to notices of assessment for years assessment 2012 and 2013.

(ii) SWSB's appeal against the decision of the High Court in dismissing other reliefs sought by SWSB in the judicial review application which are as follows:

(a) an order for *certiorari* to quash the Revenue's decision in reclassifying the proceeds arising from the disposal of SWSB's leasehold interest in land at Tanjung Bin, Johor as rental income.

(b) an order for *certiorari* to quash notices of assessment for years assessment 2012 and 2013 issued by the Revenue.

(c) a declaration that the notices of assessment for year assessment 2012, 2013 and the reclassification's decision with regard to the proceeds of the disposal of SWSB's leasehold interest in the land are invalid in law.

Background Facts

[2] SWSB is the registered proprietor of five plots of leasehold land measuring a total of 912.775 hectares or 2,225 acres in Tanjung Bin Johor ("TBJ lands") since 24 January 2005. These lands were alienated to SWSB by Johor State Government for a term of 99 years with a consideration of RM50,493,936.

[3] SWSB entered into a lease agreement with ATT Tanjung Bin Sdn Bhd ("ATB") to lease out a portion of one of the plots of land which was registered as HS(D) 11153, PTD 1851. Under the agreement, 50 hectares out of a total 315.19 hectares of the said land was leased out to ATB for a period of 30 years with an option to renew for an additional 30 years. The total consideration of the lease was RM107,600,000 which was payable in stages according to the five milestones as agreed under Schedule 3 of the lease agreement. From 2007 until 2013, a total of RM93,800,000 had been paid by ATB to SWSB under this lease agreement.

[4] On the same date, the lease agreement was executed, SWSB signed an option letter dated 26 September 2008 with ATB's parent company, Vitol Terminals BV where, in consideration of SWSB entering into the lease agreement with ATB, SWSB is to be granted an option to acquire 20% equity interest in ATB. This option is subject to the fulfilment of the following conditions:

(i) the land leased to ATB is subdivided from its registered plot which is HS(D) 11153, PTD 1851;

(ii) separate title is issued for the subdivided land and transferred to ATB for the remaining term of the 99 years lease; and

(iii) the lease on the said land is to be cancelled.

[5] However, on 27 November 2013, the Board of Directors of SWSB in its seventh board's meeting decided not to exercise the option on the grounds as stated in the extract of the board's minutes of meeting which are, *inter alia*:

(i) SWSB will lose the ownership of the land and there will be no further lease rental income from the said land; and

(ii) SWSB will need to refund the whole aggregate lease rental of RM107.60 million despite ATB has enjoyed possession of the land for five years, estimated about RM17.9 million.

[6] On 14 July 2009, ATB was registered as a lessee on the HS(D) 11153, PTD 1851 land title and on 16 July 2013 the land was subdivided and a separate title was issued to the land leased to ATB under HS(D) 12861, PTD 2051.

[7] On 17 May 2017, the revenue has conducted an investigation on SWSB and the Revenue's initial finding was that the proceeds received by SWSB arising from the lease agreement with ATB was rental income and taxable under s. 4(d) of the Income Tax Act 1967 ("the ITA"). However, by the Revenue's letter dated 28 May 2019, SWSB was informed that the income received under the lease agreement was revenue income or gains taxable under s. 4(a) of the ITA.

[8] Thereafter, between 24 January 2017 and 2 August 2019, correspondences and meetings took place between parties pertaining to *inter alia*, tax computation, extension of time to pay the tax and the imposition of penalty against SWSB.

[9] *Vide* notices of assessment dated 31 October 2019, additional assessments in Form J, for years assessment 2012 and 2013 were raised on SWSB and by letter dated 6 November 2019 to SWSB, the Revenue stated therein, the tax computation and the imposition of 60% penalty under s. 113(2) of the ITA.

[10] SWSB then filed an appeal to the Special Commissioners of Income Tax ("SCIT") against the notices of assessment for year assessment 2012 and 2013 *vide* Form Q dated 14 November 2019.

[11] On 16 January 2020, the Revenue issued notification of non-chargeability for the years assessment 2007, 2008, 2009, 2010, 2011, 2014 and 2015 to SWSB.

[12] Eventually, SWSB filed a judicial review application at the High Court before its appeal to SCIT was heard and the decision of the High Court was appealed against by both parties as alluded to earlier for determination of this court.

The Issues

[13] The core issues before us are as follows:

(i) Whether SWSB was entitled for remedies sought by way of judicial review before the domestic appeal process under s. 99 of the ITA is exhausted.

(ii) Whether the Judicial Commissioner's decision in granting the prohibition order to prohibit the Revenue from taking any steps, enforcement action or proceedings relating to notices of assessment for years assessment 2012 and 2013 is correct in law.

(iii) Whether the transaction under the lease agreement between SWSB and ATB was a sale of the leasehold interest of the land or a mere lease and whether the development expenses claimed by SWSB were deductible under sub-s. 33(1) of the ITA.

(iv) Whether the penalty under s. 113(2) of ITA which has been imposed by the Revenue at the rate of 60% against SWSB was in accordance with law.

Whether SWSB Was Entitled For Remedies Sought By Way Of Judicial Review Before The Domestic Appeal Process Under Section 99(1) Of The ITA Is Exhausted

[14] First and foremost, it is instructive to make reference to s. 99(1) of the ITA which provides:

> **Right of appeal**
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> 99. (1) Subject to subsection (1A), **a person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners** against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.
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> (emphasis added)

[15] On this issue, the Judicial Commissioner of the High Court was of the view that the existence of an alternative remedy was not a bar to a judicial review application. We totally agree with this general statement, but what the Judicial Commissioner had failed to consider is whether there is a special circumstance in the present case which entitled SWSB to by-pass the domestic appeal process under s. 99(1) of the ITA.

[16] In this regard, it is trite principle of law that where an alternative remedy exists, the remedy by way of judicial review could only be exercised in very exceptional circumstances. There is a plethora of cases on this issue and to begin with, is the Supreme Court case of *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185 where it was held as follows:

> A clear principle is reiterated here *ie*, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. *Judicial review is always at the discretion of the Court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.*

A In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

B In answer to the first question we would therefore hold that the discretion is still with the Courts but *where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice*.

(emphasis added)

C

[17] Hashim Yeop Sani SCJ, in *Jagdis Singh* (*supra*) succinctly explained that *certiorari* should not normally be issued except, if it can be shown the existence of clear lack of jurisdiction, failure to perform statutory duty or serious breach of principles of natural justice. A case may be considered as
D an exceptional case with the presence of one of the elements mentioned above.

[18] Further, in *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563, Suriyadi Halim Omar FCJ emphasised the importance for the applicant to refer the matter to SCIT
E to establish their case in the following words:

[60] *Had the respondents filed an appeal before the Special Commissioners, where the onus is on the respondents to establish their position, they will be accorded every opportunity to show where the appellant went wrong. The respondents may request for the attendance of witnesses to give evidence on oath and request any witness to*
F *produce any books, papers or documents which is in his custody or his control necessary for purposes of the appeal. Therefore, before the Special Commissioners the respondents will have all the opportunity to ventilate his disgruntlement, with every opportunity to undo what the appellant determined* (see *Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd* [1977] 1 LNS 26).

G [61] At the completion of the hearing of the appeal, *the Special Commissioners shall give their decision in the form of an order known as a deciding order, and which in certain circumstances may be final. Either party to the proceedings before the Special Commissioners may appeal on a question of law against a deciding order, or may request the Special Commissioners to state a case (generally known as case stated) for the opinion of the High Court. Any dissatisfied*
H *party may appeal only up to the Court of Appeal* (*Tio Chee Hing v. United Overseas Bank (M) Bhd* [2013] 3 MLJ 212; [2013] 2 CLJ 910; *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v. Kumar a/l Gurusamy* [2011] 2 MLJ 433; [2011] 3 CLJ 241; *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No. 08-31of 1999(S)) (unreported)).

I

[62] *By filing an appeal before the Special Commissioners the respondents would have had that opportunity to challenge the decision of the appellant* as to whether the payments were indeed royalty ...

(emphasis added)

[19] Next, in *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505; [2011] 2 MLJ 457 the second question posed to the court was 'whether the existence of a statutory appeal procedure/alternative remedy is a bar to judicial review or declaratory reliefs?' and the Federal Court answered it as follows:

[25] In the final analysis, **in the absence of exceptional or appropriate circumstances** the answer to the second question is in the affirmative.

(emphasis added)

[20] This court in a recent case of *Ketua Pengarah Hasil Dalam Negeri (LHDN) v. IBM Malaysia Sdn Bhd* [2021] 1 CLJ 776; [2021] 2 MLJ 42, which decision had been affirmed by the Federal Court, echoed the same principle of law as follows:

[57] Section 99 of the ITA expressly provides the right of appeal by filing a written notice of appeal within 30 days after service of the notice of assessment.

[58] *It is established law that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.* In *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ (Rep) 110, the Federal Court held: A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances. *In Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

[59] In *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283; [2017] 2 MLJ 197 (CA), it was held:

(3) *The respondent failed to show any special or exceptional circumstances for judicial review. It was not justified in choosing the court as a forum to ventilate its grievance when there was in existence the specific remedy of appeal before the Special Commissioners of Income Tax ('SCIT')* under s. 109H(1) of the ITA.

[60] The main grievance of the respondent against the advance ruling is the treatment of distribution fee payable by the respondent to a non-resident as royalty. It is a matter of interpretation of law, which is not a special circumstance to allow a judicial review application.

(emphasis added)

[21] Reverting to the present case, SWSB is challenging the notices of assessment for year assessment 2012 and 2013 issued by the Revenue. SWSB contended that the proceeds arising from the lease agreement with ATB was a disposal or sale of leasehold interest in the said land and SWSB was a property developer and in the business of property development as defined under reg. 3 of the Income Tax (Property Development) Regulations 2007. As such, SWSB contended *inter alia* that SWSB was entitled to deduct development expenses incurred by SWSB from the income from the disposal of the leasehold interest.

[22] In our view, SWSB's contention involves assessment and determination of material facts and the judges of facts are clearly the SCIT. In fact, the Judicial Commissioner in granting the prohibition order in this case acknowledged the need for the matter to be heard by SCIT when the prohibition order was made pending the decision of the SCIT as to the validity of the notices of assessment. This can be seen in the High Court order dated 1 July 2020 which is as follows:

> **... ADALAH DIPERINTAHKAN BAHAWA:**
>
> **(a) Semakan kehakiman diberikan setakat satu Perintah Larangan** untuk melarang Responden daripada mengambil apa-apa langkah, tindakan penguatkuasaan atau prosiding-prosiding berkenaan dengan atau yang timbul daripada mana-mana bahagian atau keseluruhan Notis Notis Taksiran bagi Tahun-Tahun Taksiran (selepas ini dirujuk sebagai "T/T-T/T") 2012 dan 2013 yang dikeluarkan oleh Responden di bawah Akta Cukai Pendapatan 1967 (selepas ini dirujuk sebagai "ACP") yang kedua-duanya bertarikh 31.10.2019 yang diposkan kepada Pemohon di bawah surat iringan Responden bertarikh 6.11.2019 (selepas ini dengan secara kolektif dirujuk sebagai "Notis-Notis Dipertikaikan") dan keputusan Responden yang tidak mengiktiraf perniagaan pembangunan harta tanah Pemohon ('Applicant's property development business') di bawah seksyen 4(a) ACP (selepas ini dirujuk sebagai "Keputusan Responden") termasuk, tanpa had, membuat tuntutan-tuntutan untuk pembayaran cukai-cukai dan penalti-penalti yang kononnya ditaksir di bawah Notis-Notis Dipertikaikan, mengeluarkan notis-notis tuntutan, atau mengambil sebarang langkah-langkah untuk menguatkuasakan atau melaksanakan Notis-Notis Dipertikaikan dan Keputusan Responden atau mana-mana keputusan atau penemuan Responden yang sama berkenaan dengan cukai-cukai dan penalti-penalti yang kononnya dibuat berikutan Keputusan Responden **sementara menunggu keesahan Notis-Notis Dipertikaikan** dan Keputusan Responden di bawah prosiding ini menurut Aturan 53 Kaedah-Kaedah Mahkamah 2012 (termasuk mana-mana rayuan selanjut daripadanya) **dan penentuan merit-merit rayuan Pemohon di bawah seksyen-seksyen 99 hingga 102 ACP yang dibaca Bersama Jadual 5 ACP (termasuk mana-mana rayuan lanjutan daripadanya)**;
>
> (emphasis added)

[23] Further, the case of *Strawberry Park Resort Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (SCIT Appeal No. PKR 540) relied heavily by SWSB to support its contention was a decision by SCIT which had assessed and determined the merits of the case.

[24] On the same issue, in *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283; [2017] 2 MLJ 197, this court reiterated the fact that SCIT are judges of facts in the following words:

> [31] *It is to be emphasised that the dispute raised by the respondent could be dealt with by the Special Commissioners of Income Tax like any other appeals on assessment. The merits of this application significantly involve disputes of facts and being as such, it is our opinion that the Special Commissioners of Income Tax being judges of fact are the best for hearing and deciding on tax grievances*. The position of the Special Commissioners of Income Tax as judges of fact has been confirmed by the Federal Court in *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161; [1995] 2 MLJ 119 when it authoritatively said:
>
> > *We say so because the Special Commissioners are the judges of fact*, and have the jurisdiction to consider not only the plea of limitation based on sub-ss. 1 and 3 of s. 91 of the Act but also other issues such as whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, all of which are issues which the court in proceedings for recovery of tax by suit is prohibited by s. 106(3) of the Act from entertaining.
>
> (emphasis added)

[25] Further, in *Berjaya Times Square Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2021] MSTC 30-454, it was also held that merits of assessment by the Revenue is best reserved for the SCIT and states this:

> 39. *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563, is one of the leading authorities for the legal proposition that Judicial Review is a court proceeding to challenge the legality of the decision-making process by a public authority. Further, the Court sitting in a JR application is exercising its supervisory jurisdiction and is not to examine the merits of the application. Before the Federal Court decision in *Alcatel-Lucent*'s case, the Court of Appeal in *Tan Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Another* [2009] 1 MLJ 555 also decided consistent with the legal proposition that the Court exercises its supervisory jurisdiction when hearing a Judicial Review application. *To state that the impugned Form J is invalid, and that it contains an error of law on the face of that Form J, is a question pertaining to the merits of the assessment, a matter better reserved for the Special Commissioners or a matter to be transmitted as a case stated to the High Court*.
>
> (emphasis added)

[26] In furtherance to this, it was the view of the court in the same case that since the appellant had filed an appeal to the SCIT, it is an abuse of process to maintain the judicial review application. At para. 29 of the case, it states:

> 29. In the present case, the Appellant had filed an appeal under section 99 of ITA to appeal against the Notices of Assessment to the SCIT and thus adhered the appeal process provided under the Act. On this reason, **we agreed with the High Court Judge that since the Appellant has filed an appeal to the SCIT under section 99 of the ITA, it is an abuse of the court process to maintain the Application**.
>
> (emphasis added)

[27] Likewise in the present case, SWSB had filed an appeal to the SCIT against Form J for year assessment 2012 and 2013 *vide* Form Q dated 14 November 2019 and thereafter filed the judicial review application. Thus, we have no reason to depart from the view that it is an abuse of court process to maintain the judicial review application.

[28] We also do not find any special or exceptional circumstances which entitled SWSB to by-pass the alternative remedy of domestic appeal process under s. 99(1) of the ITA. The additional assessment for years assessment 2012 and 2013 on SWSB was made by the Revenue pursuant to its statutory powers under sub-ss. 91(1), 91(3) and s. 96 of the ITA. For ease of reference, the relevant provisions are as follows:

> **Section 91(1)**
>
> **The Director General**, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five years after its expiration **make an assessment** or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.
>
> **(ii) Section 91(3)**
>
> (3) The Director General where it appears to him that-
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or (b) any person has been negligent, in connection with or in relation to tax, **may at any time make an assessment** in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.
>
> **(iii) Section 96(1)**
>
> (1) As soon as may be after an assessment, other than an assessment under subsections 90(1) and 91A(1), has been made, the Director General shall cause a notice of assessment to be served on the person in respect of whom the assessment was made.
>
> (emphasis added)

[29] In the present case, SWSB has not established the existence of lack or absence of jurisdiction on the part of the Revenue, blatant failure to perform statutory duty or breach of the principle of natural justice by the Revenue. SWSB's contention that the Revenue has acted *ultra vires* its statutory powers and acted in clear violation of the provision of the ITA, we find, is bereft of any basis.

[30] On this ground alone, the decision by the Judicial Commissioner in the judicial review application ought to be set aside and the matter is to be referred to SCIT for its determination.

[31] At this juncture, it is also appropriate to highlight the pertinent statement by Gill FJ in *Sun Man Tobacco Co Ltd v. Government Of Malaysia* [1973] 1 LNS 144; [1973] 2 MLJ 163 which states:

> In place of a Board of Review, we now have the Special Commissioners of Income Tax. It is open to go before them and prove that he is not liable to assessment. *The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of the remedy as laid down by the law he has a right to come to courts*.
>
> (emphasis added)

[32] Be that as it may, we will now proceed to deal with other issues raised in the appeals before us.

Whether The Judicial Commissioner's Decision In Granting The Prohibition Order To Prohibit The Revenue From Taking Any Steps, Enforcement Action Or Proceedings Relating To Notices Of Assessment For Years Assessment 2012 And 2013 Is Correct In Law

[33] The general principles relating to prohibition order were explained in a number of cases and *inter alia* in *Peter Chong Ngen Onn & Ors v. Colonel Adam Abu Bakar & Ors* [1976] 1 LNS 93; [1977] 2 MLJ 142, this was stated:

> In order to determine the questions posed by the applicants it may be useful to consider some of the general principles governing prohibition ... *Prohibition lies where – (a) there is an excess of or absence of jurisdiction; and where there is a departure from the rules of natural justice*. The order is as of right and not a matter of discretion where the defect as to jurisdiction is apparent on the face of the proceedings (see *Halsbury*'s 4th edition page 140 paragraph 131). It is, however, a matter of discretion where the defect is not patent. In that case, the court may, depending on the circumstances of each case, decline to intervene. *But "where a clear excess of jurisdiction by an inferior tribunal is brought to the notice of the court, and a prohibition is necessary in order to enforce public order in the administration of the law, the court is bound*

A *to grant it*, at least where the applicant has a personal interest in the outcome of the proceedings. It is otherwise if there is a doubt in fact or law whether the inferior tribunal is exceeding its jurisdiction or acting without jurisdiction" (see *Halsbury*'s 4th edition page 140 paragraph 132).

(emphasis added)

B **[34]** It is trite that the issuance of a prohibition order is purely a discretion of the court and the court would exercise this discretionary power if substantial injustice has ensued or is likely to ensue. In the Federal Court case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369, this was stated:

C *The short answer to the first submission is that an application for the prerogative order of prohibition is not an appeal and neither the High Court nor this court is entitled to review the merits of any decision reached by the Industrial Court …*

The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in *Sangram Singh v. Election* D *Tribunal* AIR 1955 SC 425 at p 429:

That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under art. 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along E *recognised lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue*. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature F can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.

G (emphasis added)

[35] Further, the same issue was discussed in *Inchcape Malaysia Holdings Bhd v. RB Gray & Anor* [1985] 2 MLJ 297 where the Supreme Court held as follows:

H **Prohibition is a remedy at least generally intended to prevent an excess of jurisdiction not the risk of its being erroneously exercised**, particularly where considerations of fact may be material [*Bolton Corporation* case (*supra*) per Viscount Simon L.C. at page 435]. However, in *The Queen v. Federal Court of Australia, Ex parte WA National Football League* (1978-79) 143 CLR 190 Barwick C.J. after stating that the grant of prohibition is an I exercise of original jurisdiction and not part of the appellate process, continued:

> **Prohibition to restrain the commencement or continuation of proceedings is an appropriate remedy to be granted for manifest want or excess of jurisdiction**. It may be granted before a decision has been given or it may be granted thereafter to restrain proceedings upon the decision or order.
>
> (emphasis added)

[36] The above-cited authorities clearly show that a prohibition order may be granted in circumstances where there is an excess or absence of jurisdiction or there is a breach of rules of natural justice. Further, the discretionary power to grant prohibition order should only be exercised if substantial injustice has ensued or is likely to ensue.

[37] Reverting back to the present case, as alluded to earlier, SWSB is challenging the notices of assessment for years assessment 2012 and 2013 by the Revenue. In relation to this, ITA provides the powers for the Revenue to make the assessment as mentioned earlier under ss. 91(1), 91(3) and 96 of the Act. Further, under ss. 103(1), 103B and 106(1) authorise the Revenue to initiate civil recovery proceedings for taxes due and payable against SWSB based on the investigation carried out by the Revenue. In fact, s. 103B of ITA requires a taxpayer to pay taxes due, even if there are any proceedings instituted by the taxpayer.

> **Section 103B** states:
>
> **The institution of any proceedings** under any other written law against the Government or the Director General **shall not relieve any person from liability for the payment of any tax**, debt or other sum for which he is or may be liable to pay under this Part
>
> (emphasis added)

[38] The Revenue's powers, duties and functions, including assessment of taxes are spelt out in the ITA and also Inland Revenue Board of Malaysia Act 1995 ("IRBMA"). In example s. 10(a) of IRBMA provides:

> 10. the functions of the board shall be:
>
> (a) to act as agent of the Government and to provide services in administering, **assessing**, collecting and enforcing **payment of income tax**, petroleum income tax, real property gains tax, estate duty, stamp duties and such other taxes as may be agreed between the Government and the Board.
>
> (emphasis added)

[39] Having considered the facts and the relevant laws in the present case, we are of the view that there was no excess or absence of jurisdiction on the part of the Revenue in its assessment of tax on SWSB. Further, there is nothing to show that the Revenue has departed from the rules of natural justice in exercising its statutory duty when conducting the assessment.

Equally important, there was no substantial injustice that has ensued or is likely to ensue against SWSB in the present case. SWSB still has the opportunity to establish their case before the SCIT and thereafter, if aggrieved with the decision of the SCIT, the matter can be referred to court. After all, the assessment of taxes is monetary in nature and refundable if the court so directs.

[40] In other jurisdictions too, a writ of prohibition would not be issued to prohibit the tax authority from conducting an assessment on a taxpayer and matters related thereto as mandated by law. (see: *R v. Clerkenwell Commissioners, ex p Kodak Ltd* [1901] 2 KB 879; *R v. Bloomsbury Income Tax Commissioners, ex p Hooper* [1915] 7 TC 59).

[41] In the circumstances, we are of the considered view that the Judicial Commissioner in the present case fell into error in granting the prohibition order against the Revenue.

Whether The Transaction Under The Lease Agreement Between SWSB And ATB Was A Sale Of The Leasehold Interest Of The Land Or A Mere Lease And Whether The Development Expenses Claimed By SWSB Were Deductible Under Sub-s. 33(1) Of The ITA

[42] SWSB contended that the transaction under the lease agreement was a sale or disposal of its leasehold interest of the land for a period of 30 years, with an option to renew for another 30 years. Conversely, the Revenue's stand is that the transaction is a mere leasing transaction where SWSB received rental income.

[43] In connection to this issue, the Judicial Commissioner's finding was that the transaction under the lease agreement was a sale of leasehold interest and read the meaning 'sale of vacant lots' within the definition of 'property development' under reg. 3 of the Income Tax (Property Development) Regulations 2007 to include 'sale of leasehold interest in vacant lots'. As such, the income from the disposal of the leasehold interest was business income under s. 4(a) of ITA and the property development expenses are deductible as business expenses.

[44] The Judicial Commissioner in arriving at her decision, has taken into account, *inter alia*, SWSB's memorandum and article of association (MAA) which states that SWSB is carrying on business of an investment holding and property development company, SWSB undertook various developmental activities on the land and SWSB's status as a property developer had been acknowledged by Johor State Authority.

[45] In this regard, the lease agreement dated 26 September 2008 between SWSB and ATB and in particular cl. 2.1 and recital C, clearly show that the 50 hectares of land was leased out by SWSB to ATB for a term of 30 years, with an option to renew for another 30 years. The lease rental for the period of 30 years is RM107,600,000 payable in stages according to five milestones agreed by the parties. Thus far, RM93,000,000 had been paid by ATB.

[46] There is no provision in the lease agreement that shows or indicates the sale or disposal of leasehold interest in the said land by SWSB to ATB. Conversely, under cl. 2.2C of the agreement, it requires SWSB to sub-divide the land and acquire a separate title for the land leased to ATB. After the sub-division, SWSB is to register ATB as lessee.

[47] Having perused the detailed particulars of the lease agreement, we find, the transaction arising from the agreement is clearly a mere lease of the 50 hectares of land for a period of 30 years out of the 99 years leasehold period granted by the Johor State Government to SWSB. The contents of the lease agreement are clear and no oral evidence should be accepted to contradict, vary or add to the terms of the agreement.

[48] Any restriction under the National Land Code ("NLC") for SWSB to carry out the transaction as a sale or disposal of the leasehold interest in the land does not change the fact that SWSB and ATB had entered into a legally valid and binding lease agreement. The consideration for SWSB to lease the said land is the rental payment which is the subject matter for the Revenue in making the assessment of tax.

[49] Apart from the documentary evidence which is the lease agreement, other evidence that negates the contention of the sale or disposal of the leasehold interest is the SWSB's Board minutes of meeting dated 27 November 2013 where the option to acquire shares in ATB with the condition *inter alia* that the leased land is to be transferred to ATB for the remaining term of the 99 years lease and the lease to be cancelled, was rejected by the Board. One of the reasons given by the Board was that SWSB will no longer receive the lease rental income from the said land.

[50] In addition, in SWSB reports and financial statements ("audited account") for example the audited account ending 31 December 2012 had recorded the payment from ATB arising from the lease agreement as rental income from lease of the land.

[51] When viewed the evidence in totality, we agree with the submission of counsel for the Revenue that the transaction arising from the lease agreement is a mere lease of the said land by SWSB to ATB with the agreed sum as rental.

[52] Now, the next related issue is whether the transaction or activity of leasing the said land to ATB falls under the definition of 'property development' by property developers envisaged under reg. 3 of the Income Tax (Property Development) Regulations 2007.

[53] "Property developer" and "property development" are defined under reg. 3 as follows:

> **"property developer"** means a company, an individual, a partnership, a cooperative society, a body of persons, who or which engaged in or carries on or undertakes or causes to be under taken a property development.

> **"property development"** means the activity of acquiring land for the purposes of developing, constructing or causing to be constructed thereon and selling completed residential, commercial or industrial buildings, whether as a whole or by parcels therein, and **development and sale of vacant lots** for the construction of such buildings thereon including homesteads, hobby farms, orchards or for other similar purposes.
>
> (emphasis added)

[54] In this regard, we have decided that the transaction under the lease agreement is merely a leasing of SWSB's land to ATB and not a sale of leasehold interest in the land. As such, the Judicial Commissioner's finding that the transaction was 'a sale of leasehold interest in vacant lots' and within the definition of 'project development' is untenable.

[55] It is also trite principle of law that in interpreting tax legislation, the rule of strict construction applies and there is no room of intendment. (See: *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339 (SC)). Further, a court should not read words into an Act of Parliament unless there is a clear reason for it found within the Act itself. (See: *Gan Boon Aun v. PP* [2016] 6 CLJ 647 (FC), *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449 (SC))

[56] In the present case, clearly the leased of the land to ATB does not fall within the definition of "project development" under reg. 3 and on top of that, the Judicial Commissioner has read words in the definition of "project development" when she opined that the words 'sale of vacant lots' to include 'sale of leasehold interest in the vacant lots'. This is clearly an error in interpreting a statute and in particular, tax legislation.

[57] In the circumstances, the Revenue was correct in its decision that the development expenses allegedly incurred by SWSB in the present case, are not deductible under s. 33(1) of the ITA which states:

> 33. (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained **by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred** during that period by that person in the production **of gross income** from that source, including ...
>
> (emphasis added)

[58] The case of *Strawberry Park Resort* (*supra*), relied by counsel for SWSB on this issue, can readily be distinguished on its facts. In that case, the parties entered into a lease agreement instead of sale and purchase agreement only to avoid the process of obtaining approval from the Menteri Besar for each and every sale of the condominium units. Further, the lease was for the entire leasehold land which was 85 years with the same rental amount and the renewal by lessee was as a matter of right.

[59] In the present case, the SCIT has yet to hear the appeal by SWSB. Clearly, SCIT has not made any finding of facts in this case. As such, the issue of the appellate court being bound by the finding of facts by SCIT does not arise.

[60] In this regard, it is worth mentioning the Federal Court case of *UN Finance Bhd v. Director-General Of Inland Revenue* [1975] 1 LNS 186; [1975] 2 MLJ 224 at p. 227 which state as follows:

> It may be trite to say but it will be of use to remind ourselves that *an appellate court in income-tax cases has only a limited function to perform. It is bound by the findings of facts by the Special Commissioners* and set out in the statement of the case, as stressed by Encik Nizar for the Revenue before the High Court, relying on the case of *Harrison v. Griffiths*, *supra*, per Lord Reid as page 296:
>
> > *Where, as in this case, the question is a question of fact, that means that the decision of the Commissioners cannot be reviewed by the court. But if the decision of any tribunal on a question of fact is unreasonable, looking to the facts on which it is based, the court can and must intervene*. The question in this case, is therefore, not whether the Commissioners were wrong but whether their decision was unreasonable.

And per Lord Guest at p. 303:

> The finding of the Commissioners cannot be disturbed unless it was arrived at upon a view of the fact which could not reasonably be entertained (*Edwards v. Bairstow* [1966] A.C. 14, per Viscount Simonds at page 29 Lord Radcliffe at page 36 and 39) ...
>
> (emphasis added)

Whether The Penalty Under Section 113(2) Of ITA Which Has Been Imposed By The Revenue At The Rate Of 60% Against SWSB Was In Accordance With Law

[61] Section 113(1) and (2) provides:

> **Incorrect returns**
>
> 113. (1) Any person who:
>
> (a) **makes an incorrect return by omitting or understating any income** of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) **gives any incorrect information in relation to any matter affecting his own chargeability to tax** or the chargeability to tax of any other person, shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which

A has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

(2) Where a person:

B (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person, then, if no prosecution under subsection (1) has been C instituted in respect of the incorrect return or incorrect information, *the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct*; and, if that person pays that penalty (or, where the penalty is abated or remitted under D subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

(emphasis added)

E **[62]** In the present case, upon an investigation being carried out by the Revenue, it was discovered that SWSB had failed to declare the full rental payment received from ATB arising from the lease agreement in its tax return form. This conduct is an act as described in sub-ss. 113(2)(a) and (b). As such, the Revenue has the discretion to impose a penalty equal to the amount of tax which has been undercharged. However, in this case, the Revenue had F only imposed a penalty at the rate of 60% on SWSB.

[63] The Revenue's case, upon its investigation, was that SWSB had submitted an incorrect tax return form which entitled them to impose the penalty. SWSB's justification as discussed earlier *inter alia* was that SWSB was entitled to deduct their project development's expenses which we G disagree. As such, the Revenue had established the incorrect tax return form by SWSB. In addition, as the case was not ventilated before the SCIT, this court can accept the fact as shown by the Revenue. This is fortified by the decision in *Alcatel-Lucent* case, which held as follows:

H [64] At the risk of repeating, **as there was no appeal to the Special Commissioners, this court has no option but to accept certain facts and conclusions as not reversible (*fait accompli*)**. We cannot alter the view that the payments made by the first respondent are royalty payments and now be heard to complain, **bearing in mind that they have failed to avail themselves, to echo Gill FJ, 'of that remedy as laid down by the law' I before coming to the courts**.

(emphasis added)

[64] On the penalty issue, it is apposite to refer to some of the relevant authorities in order to put the matter in its right perspective. This court in *Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 10 CLJ 114, explained the penalty's provision under s. 113 of ITA in the following words:

> [40] *It is without doubt that s. 113(2) of the Act gives a discretion to the respondent to impose a penalty on a person who has failed to observe the requirements of the law as provided in para. 2(a) or (b) of s. 113.* Hence the use of the phrase "the Director General may require that person to pay a penalty". There is a clear distinction between sub-s. 113(1) and sub-s. 113(2). Although paras. 113(1)(a) and (b) and paras. 113(2)(a) and (b) are almost identical, but the effect of sub-s. 113(1) is different from sub-s. 113(2). Sub-section 113(1) provides for an offence being committed in the circumstance provided for in para. (a) or (b) unless that person "satisfies the court that the incorrect return or incorrect information was made or given in good faith". *Whereas sub-s. 113(2) provides for a situation where there is no prosecution under sub-s. 113(1) has been instituted in the circumstances provided for in para. 113(2)(a) or (b), the Director General may require that person to pay a penalty. That being the case, the defence of "good faith" as found in sub-s. 113(1), and not found in sub-s. 113(2), does not apply to the Director General's discretion under sub-s. 113(2).* We therefore disagree with the appellant's submission on this score.
>
> (emphasis added)

[65] Next, in *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 6 CLJ 1032, which decision was affirmed by the Court of Appeal, Rohana Yusuf J (as Her Ladyship was, now PCA) said this:

> [46] Under s. 113(1) when a person makes incorrect returns or gives incorrect information he can be guilty of an offence and be liable to fine and special penalty double the undercharged tax consequential to that incorrect returns or information. A defence of good faith is provided under s. 113(1) of ITA. Section 113(2) would operate only if there is no prosecution made under s. 113(1). *Thus, for the same wrong, that is, making incorrect returns or wrongful information, a person who is not charged under s. 113(1) can be imposed with penalty under s. 113(2). Reading the two provisions quite obviously it is implied this provision operates with or without bad faith.* The Supreme Court in *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135 explained that the objective of assessment of tax contemplates filling of correct returns by taxpayer. *Filling incorrect returns attracts a penalty under s. 113(2) of ITA*. The court in that case held that this provision vested discretion in the Revenue board, a discretion that cannot be exercised at whim and fancy.
>
> [47] The evidence in this case shows that the Revenue board became aware of the RM18,000,000 claimed as deduction only upon auditing. Not for the auditing the respondent would not be aware that the deductible rental should be lesser instead. The appellant therefore would be paying

A less tax. The contention by the appellant that it was made in good faith due to the differing interpretation of the law cannot hold because ignorance of law cannot be a defence.

[48] *This country is now adopting a self-assessment regime. Thus, in line with the present policy where submission of returns are based on self assessment by tax payer,* B *a tax payer must be mindful of his responsibility to submit correct returns and must necessarily do so upon necessary consultation to ensure correct returns are submitted.*

(emphasis added)

[66] Coming back to the present case, we find the imposition of penalty by the Revenue was in accordance with the law and facts as alluded to earlier. C

Conclusion

[67] Based on the aforesaid reasons, our unanimous decision is as follows:

(i) The appeal by the Revenue against the decision by the Judicial Commissioner in granting the prohibition order in Appeal D No. J-01(IM)-323-07-2020 is allowed and the said decision is set aside with costs of RM10,000. The costs is subject to payment of allocator fee.

(ii) The appeal by SWSB against the decision of the Judicial Commissioner in not granting other reliefs sought by SWSB in the judicial review application in Appeal No. J-01(A)-352-08-2020 is dismissed with costs E of RM15,000 subject to payment of allocator fee.

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